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No. 83-1996

IN THE

Supreme Court of the United States

October Term, 1984

MERCHANTS NATIONAL BANK OF MOBILE,
Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals is reported at 725 F.2d 634. The opinion and order of the district court is unreported, but set out in Petitioner's petition for certiorari.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on February 24, 1984. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent part of § 1823(e), as amended, provides:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against

the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said Board or Committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

RESPONSE TO RESPONDENT'S STATEMENT

1. Respondent's statement of the facts concerning the Ball-Co loan closing and WCB's participation are incorrect. Being factually incorrect, the entire opposing brief fails to validly address the basis for certiorari in this case.

Although MNB was the lead bank for the Ball-Co loan, it did not take an 80% participation in the loan as Respondent states. (Brief, p. 3). The 80% participation in the loan which was guaranteed by the FMHA was sold at the time of and as part and parcel of the loan closing to Eastern Airlines Pension Fund. MNB acquired the unguaranteed portion of the loan, retained approximately half of the unguaranteed portion and sold the other half in various shares to WCB, First National Bank of Fairhope and Eastern Shore National Bank.

When Ball-Co defaulted on the loan, FMHA honored its loan guaranty and made payment directly and solely to Eastern Airlines Pension Fund. Neither MNB, WCB or any other participant in the unguaranteed portion of the loan received any part of the guaranty payment from FMHA.

2. Further, Respondent incorrectly asserts that "the WCB records do not include any support for Petitioner's claim that the WCB participation was not guaranteed (brief p. 7)." MNB relies on the Certificate of Participation Agreement from the records of WCB, which is the only document between MNB and WCB. The Certificate of Participation Agreement defines the interest acquired and there is a plethora of evidence, not admitted by the trial court, which reveals the interest acquired. MNB at no time attempted to

assert any collateral agreement against FDIC.

The trial court invoked 12 U.S.C. § 1823(e) and held that the minutes of a WCB directors meeting to which MNB was not privy were conclusive as to what WCB had purchased. It further prohibited MNB from introducing otherwise admissible evidence as to the terms of WCB's loan participation, and from showing FDIC's actual knowledge of such participation.

RESPONSE TO RESPONDENT'S ARGUMENT

1. Respondent relies on WCB records which "indicated that WCB's participation in the Ball-Co loan was guaranteed by FMHA." (Emphasis added.) Those WCB records were not part of the loan participation documentation and MNB was not privy to their preparation. The only

document executed between MNB and WCB was the Certificate of Participation, which, though listing specific items of collateral and security, did not list the FMHA guaranty as security for WCB's participation.[1] Furthermore, MNB forwarded to WCB a set of closing documents, which conspicuously omitted any and all FMHA guaranty documents. In short, both lower courts interpreted WCB's ambiguous records without any extrinsic evidence and failed to admit lawful evidence of the terms of the asset itself.

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[1] Furthermore, MNB proffered evidence that the other loan participants, Eastern Shore National Bank and First National Bank of Fairhope each received identical Certificates of Participation and loan documents, except for the amount of participation, and that each acknowledged participation only in the unguaranteed portion of the Ball-Co loan.

2. The lower courts' interpretations of § 1823(e) were entirely erroneous, since MNB never raised any collateral agreement as a defense to the action. MNB defended the action by relying on the Certificate of Participation, the only executed document between MNB and WCB, as well as proper evidence of the intention of the parties and surrounding circumstances given FDIC's allegation of ambiguity in the Certificate of Participation.

In affirming the trial court, the Eleventh Circuit Court of Appeals expanded the reach of § 1823(e) far beyond that envisioned by Congress. Until the distorted application of the statute by the lower courts in this case, it had been uniformly held that without an attempted enforcement of a collateral agreement, the provisions of § 1823(e) do not apply.

Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981); Gunter v. Hutchison, 674 F.2d 862 (11th Cir. 1982) cert denied, 459 U.S. 826 (1982). Neither the Eleventh Circuit nor the Respondent herein has satisfactorily explained the perfunctory objection of Gunter nor dealt with the conflict created with Howell.

Respondent attempts to meekly distinguish Howell by stating that "[i]n that case the defense was 'on the face of the instrument' that appeared in the books of the failed bank so that 'the foundation and basis of that defense [was] in a document arguably meeting the non-secrecy requirements of § 1823(e).' 655 F.2d at 747-748 (emphasis in original)." Yet, in the present case, MNB's foundations and basis of its defense is that the specific security and collateral identified in the

Certificate of Participation, being the only document executed between MNB and WCB and constituting the only agreements between those parties, which does not list the FMHA guaranty as security for WCB's participation. The Eleventh Circuit has thus squarely rendered an opinion in conflict with Howell, and this court should review this matter on certiorari.

3. Respondent cites FDIC v. DeJesus Velez, 678 F.2d 371 (5th Cir. 1982) as authority for the proposition that knowledge by the FDIC is not relevant under § 1823(e). (Brief, p. 8). However, the holding of that case concerned FDIC's knowledge of the existence of a collateral agreement, and not, as herein, FDIC's knowledge of the very terms of the asset upon which it brings suit. The distinction is critical. In the present case, FDIC had

actual knowledge at its highest level that WCB participated in the unguaranteed portion of the loan. This is not a case where the participation was guaranteed but there was a collateral agreement that the guaranty would not apply to WCB.

4. Respondent's reliance on Heckler v. Community Health Services, No. 83-50 (May 21, 1984), is misplaced. Heckler merely addresses the burden in an equitable estoppel case, and does not alter the fact that the government may be equitably estopped. Here, the existence of estoppel is compelling.

5. Not once has FDIC in the trial court, in the Eleventh Circuit Court of Appeals, or in this Court, identified any alleged collateral agreement attempted to be enforced by MNB. While FDIC cites § 1823(e) as authority, it ignores the fact

that the statute begins with the phrase "[n]o agreement ... shall be valid ...". The statute does not say that evidence of the disputed terms of an ambiguous asset shall be inadmissible. The Eleventh Circuit's expansion of § 1823(e) beyond its literal terms is unwarranted. Accordingly, the petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 13th day of September, 1984, served three (3) copies of the foregoing on Margaret L. Egginton, Counsel for Respondent and three (3) copies on the Solicitor General by mailing the same by United States mail, properly addressed and first-class postage prepaid, all in accordance with Rules 28.3 and 28.4 of the Rules of the Supreme Court of the United States.

Alan J. Christian